

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.REV.P. 402/2006**

Judgment delivered on: 26.03.2007

RAJ KUMAR

.... Petitioner

versus

STATE (NCT OF DELHI)

.... Respondent

Advocates who appeared in this case:-

For the Petitioner : Mr. R. P. Lao

For the Respondent : Mr Pawan Sharma

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether the Reporters of local papers may be allowed to see the judgment? YES
2. To be referred to the Reporter or not? YES
3. Whether the judgment should be reported in the Digest? YES

BADAR DURREZ AHMED, J

1. This revision petition has been filed by the petitioner being aggrieved by the order dated 22.05.2006 passed by the additional Sessions Judge whereby he confirmed the conviction and sentence awarded by the learned CMM under Sections 279 and 304-A IPC. The learned CMM sentenced the petitioner to undergo rigorous imprisonment for six months. Insofar as the offence under Section 304A IPC was concerned, the learned CMM sentenced the petitioner to rigorous imprisonment for two years and also imposed a fine of Rs 5000. In default of the payment of fine, the petitioner was required to undergo simple

imprisonment for three months. Both the sentences of imprisonment were directed to run concurrently. In appeal, the learned additional Sessions Judge upheld the conviction as well as the sentence. Being aggrieved by the said judgment dated 22.05.2006 the petitioner has filed this revision petition.

2. The prosecution case is that on 30.9.93, at around 10:45 pm, the petitioner was driving a blue line bus in a rash and negligent manner and was coming from Pahargunj. It is put forward by the petitioner, that at the intersection, a three-wheeler (Taxi Scooter Rickshaw) (TSR) which was coming from the opposite direction suddenly took a U-turn. The petitioner in order to avoid the hitting the TSR, swerved the bus to the left and momentarily lost control of the bus, thereby injuring one person (Joginder) and causing the death of two persons (Kitab Singh and Tavinder Nath) who were standing at the bus stand.

3. There are two alleged eyewitnesses to the incident namely Joginder and Jagdish Lal (PW4). The prosecution did not produce Joginder and therefore his testimony is not on record. It is also important to mention that the prosecution also did not examine the investigation officer. The case of the prosecution is based completely on the testimony of Jagdish Lal (PW4), who is the brother of the deceased Tavinder Nath.

4. An examination of the judgment of the learned ASJ as well as that of the learned CMM would also indicate that the petitioner has been convicted primarily on the testimony of PW4, who stated that the petitioner was driving the bus at a very fast speed due to which he could not control the bus and caused the accident.

5. The mechanical inspection of all the vehicles involved in the incident indicate that they were mechanically “ok”. The reasoning of the learned CMM is as under:-

“Every motorist is duty bound to drive the vehicle in controlled manner so as to avoid impact with any object coming ahead of it. Had he been driving the vehicle in controlled manner, he could have saved the accident as after hitting the TSR he hit the two wheeler scooter as well as the bus stand and the impact of the accident itself suggest that he was driving the vehicle with a fast speed and could not control.”

6. The petitioner, before this court, has preferred this revision on the following grounds:-

- a. That the investigating officer and the injured witness (Joginder) have not been examined.
- b. That Jagdish Lal (PW4) is a planted witness and was not present on the spot at the time of the accident and more so Jagdish Lal met the investigating officer only after two hours.
- c. That the scene of the incident was a flourishing and busy market and, hence, there could be no question of rash and negligent driving.

7. As regards the first plea of the petitioner pertaining to the non-examination of the Investigating Officer and the alleged injured person (Joginder), in **Bahadur Naik v. State of Bihar: (2000) 9 SCC 153**, the Supreme Court observed that where the accused has not been able to shake the credibility of the eyewitness nor could he show as to how prejudice has been caused to him by non-examination of the investigating officer, the non-examination of the investigation officer as a witness is of no consequence. Similarly, the Supreme Court decisions in **Krishna Mochi v. State of Bihar: (2002) 6 SCC 81**, **Raj Kishore Jha v. State of Bihar: (2003) 11 SCC 519** and **Birendra Rai v. State of Bihar: (2005) 9 SCC 719** also reiterate that non-examination of the investigating officer does not vitiate the trial unless prejudice caused to the accused is shown and the testimony of the eyewitness is unreliable. This is the legal position with regard to the non-examination of the investigating officer and the injured person (Joginder). As to how it effects the present case would be examined below.

8. The next plea of the petitioner is that Jagdish Lal (PW4) is a planted witness and came to the police station for the recording of his statement after two hours. Jagdish Lal (PW4) deposed that he is the brother of the deceased Tavinder Nath and he along with his brother were standing at the bus stand at the time of the incident. He further deposed that, after the accident, PCR Officials came to the spot and they rushed the injured to hospital where he was

declared “brought dead”. No where does Jagdish Lal (PW4) mention that he had taken his brother to the hospital. On the contrary, surprisingly, after the incident, he waited for about 10 to 15 minutes for the PCR officials to come to the spot and it is they who take his brother to hospital. Moreover, neither the MLC or any of the documents or witnesses indicate that Jagdish Lal (PW4) brought the deceased to the hospital. The conduct of Jagdish Lal (PW4) is not clear. Normally, Jagdish Lal (PW4) would have immediately pressed for taking his injured brother to hospital and would not have waited for ten to fifteen minutes. Moreover, he would have accompanied his brother to the hospital. This is not established by the evidence on record. Thus, there are doubts with regard to the role of Jagdish Lal (PW4) and, consequently, his presence at the time of the incident. These doubts could have been removed by the examination of the other injured witness (Joginder) and the investigating officer. In these circumstances, the petitioner has been prejudiced and the non-examination of Joginder as also the investigating officer is a material circumstance in favour of the petitioner.

9. Now, coming to the last plea of the petitioner that, on the fateful day, at the scene of the incident, there was a busy and flourishing market and that there was no possibility of driving the vehicle fast, rashly and negligently. This plea cannot be given much weightage as the occurrence was at night at about 10.45

pm at night. It was not during the peak hours of the market. There is also no evidence as to the extent of traffic on the roads.

10. As regards the contention of rash and negligent driving, the entire allegation is based on the testimony of Jagdish Lal (PW4). In his examination in chief, the said witness has stated:-

“The bus was at very fast speed due to which the driver could not control the bus and caused the accident.”

In cross-examination, the same witness stated:-

“..... we must have seen the bus about 3/4 minutes before the occurrence.”

As mentioned above, it is on the basis of the statement of Jagdish Lal (PW4) that the courts below have convicted the petitioner. The said witness has stated that the bus was being driven at a “very fast speed”. He further stated that because it was so being driven, the driver could not control the bus and the accident was caused. Therefore, the foundation of the allegation against the petitioner is that he was driving the bus at a “very fast speed”. There is no evidence as to what this “very fast speed” was. A similar aspect was considered by me in the case of ***Abdul Subhan v. State of NCT: 133 (2006) DLT 562***. The question that was considered was that whether a person could be convicted merely on the allegation that he was driving a vehicle at a high speed. A reference to the Supreme Court decision in the case of ***State of Karnataka v. Satish: 1998 SCC (CRI) 1508*** was made wherein the Supreme

Court observed that merely because a vehicle was being driven at a high speed does not bespeak of either negligence or rashness by itself. In the case before the Supreme Court, none of the witnesses examined by the prosecution could give any indication, even approximate, as to what they meant by “high speed”. The Supreme Court observed that “high speed” is a relative term and that it was for the prosecution to bring on record material to establish as to what is meant by “high speed” in the facts and circumstances of the case. The Supreme Court also cautioned that in a criminal trial, the burden of proving everything essential to the establishment of the charge against the accused always rests on the prosecution and that there is a presumption of innocence in favour of the accused until the contrary is proved. The Supreme court also observed that in the absence of any material on record, no presumption of “rashness” or “negligence” could be drawn by invoking the maxim “res ipsa loquitur”.

11. In the case of *Abdul Subhan* (supra), this Court has observed that the Supreme Court decision made it more than clear that a mere allegation of high speed would not tantamount to rashness or negligence. In that case, because there was absence of material to indicate the speed at which the truck was being driven, the accused was given the benefit of doubt inasmuch as it could not be said that the accused therein had been guilty of driving the truck in a rash or negligent manner.

12. The statement of Jagdish Lal (PW4) that the bus was being driven at a “very fast speed” is not corroborated by any other evidence. Moreover, his statement in cross-examination that he must have seen the bus about 3/4 minutes before the occurrence, also appears to controvert the statement that the bus was being driven at a “very fast speed”. This is so because if the bus was travelling at 60 kilometers an hour, then the said witness would have seen the bus at least 3-4 kilometers away, which would not be possible on a plain road at 10.45 pm at night. Assuming that the bus was being driven at 30 kilometers an hour, the witness would then have seen the bus, at a distance of 1-1/2 to 2 kilometers, which again does not stand to reason. This clearly indicates that one of the two statements is not correct and, therefore, it introduces a serious element of doubt with regard to the speed at which the bus was being driven and, consequently with regard to the very allegation of rashness and / or negligence on the part of the accused.

13. Coupled with the aforesaid observations with regard to the speed at which the bus was being driven, is the fact that the investigating officer was not examined nor was the other injured person (Joginder) examined. Non-examination of these witnesses has certainly worked out to the prejudice of the accused and, therefore, the sole testimony of Jagdish Lal (PW4) cannot be relied upon to convict the petitioner. Unfortunately, the courts below failed to consider the case in this light. The petitioner is, therefore, not liable to be

convicted under the provisions of Section 279 and 304A IPC. This revision petition is allowed. The impugned order is set aside and the petitioner is entitled to an order of acquittal.

**BADAR DURREZ AHMED
(JUDGE)**

**March 26, 2006
SR**